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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1388

KARL J. KIRCHBERG,

Appellant,

v.

JOAN PAILLOT FEENSTRA,

Appellee,

v.

EDWIN W. EDWARDS and STATE OF LOUISIANA.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF NOW LEGAL DEFENSE AND EDUCATION FUND, AMERICAN CIVIL LIBERTIES UNION WOMEN'S RIGHTS PROJECT, AMERICAN JEWISH COMMITTEE, AMERICAN JEWISH CONGRESS, INSTITUTE FOR WOMEN TODAY, NATIONAL CENTER ON WOMEN AND FAMILY LAW, NATIONAL COALITION OF AMERICAN NUNS, UNITARIAN UNIVERSALIST WOMEN'S FEDERATION, WOMEN'S EQUITY ACTION LEAGUE, WOMEN'S LEGAL DEFENSE FUND.

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The NOW Legal Defense and Education Fund, American Civil Liberties Union Women's Rights Project, American Jewish Committee, American Jewish Congress, Institute for Women Today, National Center on Women & Family Law, National Coalition of American Nuns, Unitarian Universalist Women's Federation, Women's Equity Action League, and the Women's Legal Defense Fund respectfully move, pursuant to Rule 36.3 of this Court's Rules, to file the within brief *amici curiae* in *Kirchberg* v. *Feenstra.* Counsel for Appellant Karl Kirchberg and Appellee Joan Feenstra have consented to the filing of this brief and their letters of consent have been filed with the Clerk. The State

of Louisiana, defendant below, has failed to respond to repeated requests for its consent.

The above named *amici* organizations share the conviction that women and men should be accorded equal treatment under the law. Gender discrimination constitutes a formidable barrier to the full participation of individuals in our society and these organizations are dedicated to the eradication of that barrier.

Louisiana's head and master law at issue here, which gives husbands exclusive and unrestricted power to manage the assets of the marital community, is one of the most egregious examples of the way in which laws based on outdated and unjust sexual stereotypes harm women and perpetuate inequality. As the facts in this case illustrate, the consequences of such a law are tragic, not only for Appellee here, who is threatened with the loss of her family home, but for all women. The message of the statute is clear: a state may treat women as second class citizens, conclusively presume them incapable of exercising management powers and deny them equal rights, even as to property which they own.

Amici respectfully submit that this brief will serve to illuminate the issue before the Court by placing it in a broader context than the parties, whose appropriate focus is the particular application of the head and master law that gave rise to this litigation. Such context is relevant for consideration of one of the principle constitutional guarantees—that of equal protection. The brief delineates the gender line that pervades the male management system; details the pernicious impact that sex role stereotyping has on all women; contrasts Louisiana's head and master law with the management schemes employed by other community property and common law states; and offers additional information from the legislative history of Louisiana's recent repeal of Article 2404 and its com-

panion provisions. *Amici* believe that this information will assist the Court in resolving the issues raised by this case.

Respectfully submitted,

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Interest of *Amici*

The interest of *amici* appears from the foregoing motion.

Statement of the Case

At issue in this case is whether Louisiana's designation of the husband as sole "head and master" of the community property acquired by both the husband and wife during their marriage can withstand constitutional scrutiny.[1] This codal provision confers upon the husband, while denying the wife, the exclusive power to administer, dispose of, alienate or encumber the marital property, without the consent or permission of his wife. As applied in this instance, Article 2404 allowed a husband, charged by his wife with a "crime against nature," to give his attorney in that criminal proceeding a mortgage on the couple's family home as security for the payment of his legal fees. Threatened by the lawyer with seizure and judicial sale of her home, the wife has sought to remedy the egregious injustice suffered as a result of the application of the gender based classification drawn by the Louisiana law.

In October, 1974, Joan Feenstra, Appellee, learned that her husband, Harold Feenstra, had molested their nine year old daughter. Mrs. Feenstra asked her husband to leave their home and, when he refused, filed criminal charges against him in an effort to protect her child.

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[1] Article 2404 of the Louisiana Civil Code, as challenged herein, provides in pertinent part:

> The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

La. Civ. Code Ann. art. 2404 (West 1971).

Article 2404 was repealed after the institution of this litigation and replaced by Act 709, effective January 1, 1980, which provides for management of community property on a gender neutral basis. Act of July 20, 1979, Act 709, 1979 La. Sess. Law Serv. (West 1979) (repealing 1976 La. Acts, No. 627). As used herein, "Article 2404" will refer to the statute as it existed prior to the passage of Act 709.

Harold Feenstra was arrested on or about October 12, 1974. While in prison, he retained attorney Karl J. Kirchberg, Appellant herein, to represent him.

Five days after his arrest, Harold Feenstra allegedly signed a promissory note to Kirchberg in the amount of $3,000 as a retainer f. r the legal services Kirchberg was to render.[2] The note, Kirchberg contends, provided for interest at 8% per year and attorney's fees amounting to 30% of the obligation, if the note were not paid when due.[3] It appears that Feenstra paid Kirchberg approximately $800 the day following his signing of the note.

Shortly after Feenstra's execution of the promissory note, Kirchberg apparently demanded security for the instrument, insisting that Feenstra execute a mortgage in favor of Kirchberg on the Feenstra family home. On October 22, 1974, Feenstra executed an "Act of Mortgage," subsequently recorded, which was drafted by and for the benefit of Kirchberg and notarized by Kirchberg's

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[2] The record is not clear as to the nature of the services actually performed by Kirchberg for Harold Feenstra. Kirchberg contends that it was as a result of his efforts that Feenstra was not prosecuted. Belying such assertions, however, is the statement of Mrs. Feenstra, who maintains that she dropped the charges against her husband soon after his arrest, when she felt assured that her husband no longer posed a threat to her child.

Moreover, whether the retainer agreement was applicable solely for the defense of the criminal proceedings or whether other legal services would be provided in the future for Mr. Feenstra, until the reasonable value of those services reached $3,000, is likewise not apparent from the existing record. It appears that Kirchberg's law firm performed further services for Mr. Feenstra in connection with separation proceedings against Joan Feenstra. *See* discussion *infra* at 7.

[3] The promissory note was not made part of the record below; accordingly, when and whether the time for payment became due under the note is unclear. Kirchberg contends that the note became due on October 18, 1974, the day after it presumably was executed.

law partner. This Act of Mortgage stated that Feenstra's obligation was $3,000, despite the fact that Feenstra had satisfied almost one-third of the alleged debt on the day immediately prior thereto.[4]

After his release from jail, Harold Feenstra did not return to the home in which he had resided with his wife. Rather, he left Louisiana and the marriage, having expressed his intention to give his interest in the marital home to his wife, and having instructed attorney Kirchberg to draw the documents necessary to effect such a transfer. Harold Feenstra, represented by Kirchberg's partner, C. Howard McCaleb, III, commenced a marital separation proceeding, and a separation from bed and board was granted on June 10, 1975. However, neither Kirchberg nor his law partner McCaleb ever effectuated the transfer of the Feenstra marital home to Joan Feenstra, as Harold Feenstra had instructed.

Feenstra, as Kirchberg concedes, made payments, totalling $225, in partial satisfaction of the obligation under the promissory note,[5] on the date the separation action was filed and on the date a judgment granting separation was awarded.

The Feenstra home to which Kirchberg claims title was described by Kirchberg, in order to assist the U.S. Marshal

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[4] In the petition for mortgage foreclosure, Kirchberg sought only $2,015.28 principal, thus presumably crediting Feenstra with payments of $984.72, approximately $800 paid by Feenstra while incarcerated, and approximately $225 paid some eight months later, in all likelihood in connection with the separation proceedings, discussed *infra* at 7.

[5] It is noteworthy that in the two instances in which Kirchberg represented Harold Feenstra—defending the criminal molestation charges filed by Mrs. Feenstra and obtaining the marital separation—Harold and Joan Feenstra were in a clearly adversary relationship. Nevertheless, the absurd effect of the operation of the Louisiana codal provision at issue is that Joan Feenstra is exposed to liability for the costs of defending her husband in the very proceedings in which she opposed him.

in effecting service on Joan Feenstra, as a "green rundown camp across from a volunteer fire truck." It had been purchased by Joan and Harold Feenstra in both their names and with both their funds (he from wages and she from the sale of fish) in 1966, almost eight years prior to the events which led to the Act of Mortgage.

Joan Feenstra not only did not consent to, but also was given no notice whatever of, the encumbrance on the marital home, which she owned jointly and equally with her husband under the Louisiana laws governing property. Indeed, Mrs. Feenstra had no knowledge of any codal provision which permitted her husband to jeopardize her interest in her property without her knowledge or consent. Her first formal notice of Kirchberg's claim to her family home was in February 1976, more than a year after Harold Feenstra's incarceration, when she was served with a summons commencing the action for a mortgage foreclosure in the Civil District Court of Orleans.

Kirchberg filed a second action in the United States District Court for the Eastern District of Louisiana, seeking a declaratory judgment that he had not violated the Truth-In-Lending Act, 15 U.S.C. § 1635(a), in connection with the mortgage. Mrs. Feenstra counterclaimed against Appellant Kirchberg, the State of Louisiana and the Governor, urging, *inter alia,* that the male management provision of Louisiana's Civil Code was unconstitutional on equal protection and due process grounds.

In April 1977, the district court granted the motion of the State of Louisiana for summary judgment on Mrs. Feenstra's counterclaim. The court concluded that the Civil Code provision did not violate the equal protection and due process clauses of the Constitution on the theory that the parties had the opportunity to select their own community property regime. *Kirchberg* v. *Feenstra,* 430 F. Supp. 642 (E.D. La. 1977), *rev'd,* 609 F.2d 727 (5th Cir. 1979).

The Fifth Circuit unanimously reversed, in an opinion issued December 12, 1979. The Court held prospectively that Article 2404 of the Louisiana Civil Code was unconstitutional under the fourteenth amendment. *Kirchberg* v. *Feenstra,* 609 F.2d 727 (5th Cir. 1979).

The Louisiana head and master law was repealed by the Louisiana Legislature before the Fifth Circuit declared it constitutionally invalid. The Legislature enacted a gender neutral rule for management of community property, to replace male management. This change became effective January 1, 1980, only twenty days after the Fifth Circuit issued its ruling.

The issue to be decided by this Court, therefore, does not affect the future of—or threaten chaos to—the Louisiana community property regime. It does, however, have great significance to the parties before the Court; to women whose property was alienated or encumbered pursuant to the male management provisions during the brief period before Louisiana's new law went into effect; and to all women who have been denigrated by the Louisiana decree that knighted their husband as "head and master" and branded them as incompetent and unworthy.

Summary of Argument

I.

Article 2404 of the Louisiana Civil Code, in effect at the time the mortgage on Joan and Harold Feenstra's home was executed, grants a husband exclusive and unrestricted managerial control over the married couple's community property. This head and master law distinguishes between similarly situated husbands and wives solely on the basis of their sex. Despite the wife's contribution to the marital community—as wage earner or homemaker—and her indisputable ownership interest in the community property, the law deprives her of the right to manage and control her property.

The Louisiana community property regime provides two procedures whereby male management can be modified. First, if a prospective husband agrees to relinquish his preferred status, the couple can execute an antenupital contract specifying a different form of management in whole or in part. Second, in the absence of such contract, a wife can file a declaration by authentic act under Article 2334, through which she can gain a veto power over her husband's alienation of specified immovable property titled in the couple's joint names.

Contrary to Appellant Kirchberg's assertions, the availability of these alternatives does not transform male management into a voluntary arrangement between husband and wife. Rather, this gender biased law is imposed on the marriage by the State, thereby invidiously discriminating against women. The fact that the head and master law is not in all respects an insurmountable barrier for Louisiana wives cannot save it from constitutional scrutiny.

The gender classification at issue here is based on archaic and overbroad sexual stereotypes about the respective capabilities of, and proper roles for, women and men. These stereotypes teach that the wife is dependent, inexperienced and incompetent, while the husband is the head of the family and, by virtue of biology and experience, skilled in business matters. Such assumptions do not comport with economic or social reality, or with the principles underlying joint ownership of marital property. This Court has held repeatedly that laws based on sexual stereotypes about the capabilities of women or the allocation of family roles are incompatible with the equal protection principle.

II.

To be deemed constitutional, a gender classification must bear a close and substantial relationship to an important governmental objective. *Craig* v. *Boren*, 429 U.S. 190, 197

(1976). The burden is on the proponents of the statute to make the showing required by this standard. The State of Louisiana and Appellant Kirchberg have totally failed to carry this burden.

In the proceedings below, the State of Louisiana offered only one sentence to describe the governmental interest underlying Article 2404: "One of the two spouses has to be designated as the manager of the community." *Kirchberg* v. *Feenstra,* 609 F.2d at 735. The similarity between Louisiana's legislative choice of the husband as the managing spouse and the statutory scheme held invalid in *Reed* v. *Reed,* 404 U.S. 71 (1971), leads ineluctably to the conclusion that the State interest here is not sufficiently important to pass constitutional muster.

Moreover, no substantial relationship has been, or can be, established between the gender classification in Article 2404 and any governmental interest. To the contrary, the State's repeal of the head and master law and enactment of an equal management provision effective January 1, 1980, demonstrates that management of marital property can be assured consonant with the equal protection principle. The fact that all other community property states, consistent with the trend in common law states, have eradicated by statute the vestiges of male management from their marital property laws, signals a nationwide consensus that sex based classification is not the least discriminatory or most efficient method of allocating management power. Failing to satisfy either part of the *Craig* standard, the Louisiana head and master law is constitutionally invalid and must fall.

ARGUMENT

I.

LOUISIANA'S DESIGNATION OF THE HUSBAND AS "HEAD AND MASTER" OF THE MARITAL COMMUNITY, WITH EXCLUSIVE POWER TO ADMINISTER AND ALIENATE THE MARITAL PROPERTY, IS ROOTED IN ARCHAIC AND OVERBROAD SEXUAL STEREOTYPES AND CONSTITUTES INVIDIOUS GENDER BASED DISCRIMINATION AGAINST THE WIFE.

A. Article 2404 Draws An Invidious Gender Line Between Similarly Situated Husbands And Wives.

The Louisiana Code classification at the heart of this case, Article 2404, grants a husband, while denying a wife, exclusive and complete managerial control over the couple's community property.[6] Once married or residing in Louisiana, under this Article, the wife has no power to administer, encumber or sell any of the community property without her husband's consent, even if title is held solely or jointly by her. The husband in Louisiana, in contrast, is designated by the State as the "head and master" with complete and unlimited authority over the marital property.

This codal provision exonerates the husband from any responsibility to give notice to or obtain permission from his wife before encumbering or disposing of their property, except where the wife holds exclusive title to the property. Thus, regardless of the wife's contribution to the marital community—as a wage-earner or as a homemaker—this head and master law imposes upon her all of the obligations of ownership, while, at the same time, depriving her of one of the most significant incidents of ownership—management.

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[6] *See* n. 1 *supra.*

The gender line drawn by the Louisiana head and master law decisively distinguishes between similarly situated husbands and wives. The allocation of management control by the State to the husband bears no relationship to the actual ownership of the community property. Nor, as discussed below, does it relate to managerial competence or contribution to the assets or the community. *See infra* at 19-23. Under Louisiana law, all property acquired during the marriage by either spouse, except that which is received by gift or inheritance, belongs to the community, owned one-half by the husband and one-half by the wife; yet the law grants only the husband the sole right to manage the marital property. *See T. L. James & Co.* v. *Montgomery,* 332 So.2d 834 (La. 1976); M. Vaughn, *The Policy of Community Property and Inter-Spousal Transactions,* 19 Baylor L. Rev. 20, 53 (1967) [hereinafter cited as Vaughn, *Policy of Community Property*]. Thus, while Mr. and Mrs. Feenstra each owned one-half of their family home, the Louisiana law in effect during their marriage allowed Mr. Feenstra to mortgage it without Mrs. Feenstra's knowledge or consent to secure payment of his legal fees in actions in which he and Mrs. Feenstra were adversaries.

As the Fifth Circuit noted, several alternatives existed to the management system selected by Louisiana. "The community could be managed by the husband exclusively (as provided in article 2404), by the wife exclusively, by the husband and wife acting jointly, or by either the husband or wife acting concurrently." *Kirchberg* v. *Feenstra,* 609 F.2d at 733. In choosing management by the husband alone, Article 2404 calls for different treatment of similarly situated married persons, where the only basis for that different treatment is whether the person is female or male. *Reed* v. *Reed,* 404 U.S. at 75.

B. The Availability Of Procedures To Limit Male Management Does Not Mitigate The Gender Classification Drawn By The State Or Remove "Head And Master" From Constitutional Scrutiny.

The wife could remove herself from this onerous regime only if her prospective husband agreed to relinquish his rights as "head and master" *before* the marriage and enter an antenuptial contract.[7] Once married, the relief available to the wife is limited. She could protect her interest in the community property only by taking formal steps, pursuant to Article 2334,[8] to declare that her consent must be obtained prior to any encumbrance or sale of specified property by her spouse. Such so-called "opt-out" alternatives do not rescue the head and master law from constitutional infirmity, as Appellant Kirchberg contends.

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[7] La. Civ. Code Ann. art. 2325 (West 1971) (repealed by Act of July 20, 1979, Act 709, 1979 Sess. Law Serv. (West 1979)).

[8] Article 2334 of the Louisiana Civil Code, in effect at the time of the mortgage herein, provided in relevant part:

> Where the title to immovable property stands in the names of both the husband and wife, it may not be leased, mortgaged or sold by the husband without the wife's written authority or consent where she has made a declaration by authentic act that her authority and consent are required for such lease, sale or mortgage and has filed such declaration in the mortgage and conveyance records of the parish in which the property is situated.

This provision was amended in 1976, effective January 1, 1977, to require, *inter alia*, the wife's written authority or consent before alienation of immovable property titled in the names of both the husband and the wife. La. Civ. Code Ann. art. 2334 (West Supp. 1979). Thus, the mortgage held by attorney Kirchberg on Mrs. Feenstra's home could not have been validly executed after January 1, 1977 without her consent. Section 2334 was repealed by Act 709, effective January 1, 1980. As used herein, "Article 2334" will refer to the statute as it existed at the time the mortgage on Mrs. Feenstra's home was executed.

Indeed, they perpetuate the very same discriminatory classification between similarly situated husbands and wives, by placing burdens on the wife that her husband is not required to bear, and denying her management rights equal to those conferred upon him by the State.

The antenuptial contract clearly does not give the Louisiana wife any unilateral power to overcome the male management barrier erected by the State. Instead, it leaves her totally dependent on her prospective husband's willingness to relinquish the preferred position he is accorded by operation of law. Moreover, it works a severe hardship on the woman who is unfamiliar with Louisiana law, for only a contract executed before the wedding ceremony would be valid and enforceable,[9] and once the couple exchanged marriage vows, any antenuptial agreement between them could not be "changed or altered after marriage, even by formal agreement." *Hanley* v. *Drumm*, 31 La. Ann. 106, 111 (1879). In the absence of such a contract prior to the marriage ceremony, husband management automatically governed.[10] As the Fifth Circuit correctly

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[9] La. Civ. Code Ann. art. 2329 (West 1971) (repealed by Act of July 20, 1979, Act 709, 1979 Sess. Law Serv. (West 1979)).

[10] The district court below erred in concluding that since Mrs. Feenstra "failed to protect her home by elimination or modification of the community regime through a marriage contract," *Kirchberg* v. *Feenstra*, 430 F. Supp. at 648, the head and master provisions became part of a tacit contract she and Mr. Feenstra entered upon signing the marriage license. *Id.*

Since an antenuptial agreement requires the consent of both prospective husband and wife, it defies logic to characterize the absence of a formal antenuptial contract, modifying the presumption of male control, as Mrs. Feenstra's "failure." Moreover, the tacit contract theory is unsound logically, historically and theoretically, and should not be the fiction through which the discriminatory head and master law is saved from constitutional scrutiny. *See* Amicus Curiae Brief for the Appellant at 9, *Kirchberg* v. *Feenstra*, 609 F.2d 727 (5th Cir. 1979). The Fifth Circuit correctly rejected this argument. *Kirchberg* v. *Feenstra*, 609 F.2d at 733, n. 14.

observed below, the choice presented by the State between male management and an antenuptial contract

> is hardly an even-handed one. . . . The couple wishing to vest the wife with even minimal rights and responsibilities concerning property to which her claim is as great as her husband's must not only take the initiative in contractually emancipating the wife, but must also pay an economic penalty for doing so.

Kirchberg v. *Feenstra,* 609 F.2d at 733, n. 14.

The Article 2334 declaration alternative available to the Louisiana wife after marriage is the *only* method by which she could, on her own, partially protect her equal share of community property from overreaching by her husband. Unlike the antenuptial contract, this alternative to husband management can be invoked at any time during the marriage and does not require the husband's agreement to relinquish his preferred position. However, the declaration can be made only with respect to specified immovable property held in the names of both spouses. It is enforceable only if formally executed by "authentic act"—that is, in the presence of a notary public and two witnesses—and filed for each particular property with the local Register of Conveyances and Recorder of Mortgages. Moreover, the declaration cannot confer any authority upon the wife to manage or alienate any part of the jointly owned marital property; it merely gives her a veto power to prohibit her husband from doing so without her consent.

Despite the fact that the relief available through these "opt-out" procedures is both inadequate and unfairly burdensome, Appellant Kirchberg argues that Mrs. Feenstra is the "architect of her own predicament" since she could have overcome the head and master barrier established by the State. *See* Appellant's Brief at 14-18. However, neither the possibility that the Feenstras could

have executed an antenuptial contract, nor the availability to Joan Feenstra of an Article 2334 "veto power" declaration, can transform the head and master system into a voluntary arrangement. There is absolutely no evidence that Joan Feenstra knowingly and willingly placed her property under her husband's sole management and control.

Moreover, the mere fact that a Louisiana wife might overcome male management in whole or in part does not mitigate the law's invidious gender bias or remove it from constitutional review. As this Court has recognized in other situations, the "absence of an insurmountable barrier" will not save an unconstitutional law. *Trimble* v. *Gordon,* 430 U.S. 762, 774 (1977). This same analysis should be applied with full force to the Louisiana statutory scheme.

Thus, where a statutory classification, like the one at issue here, operates only if individuals have not acted on their own, it is not thereby immune from constitutional review because the barriers it erects are not absolute. In *Reed* v. *Reed,* for example, the statutory preference for males over similarly situated females as estate administrators became relevant only if the decedent failed to name his or her administrator. 404 U.S. at 72-73. *See also Trimble* v. *Gordon,* 430 U.S. at 762 (out of wedlock children precluded from inheritance by statute only where their fathers failed to provide for inheritance by will). So too, Louisiana's male management law operates only where the marriage is not governed by a valid antenuptial contract, which the disadvantaged wife has no power to compel. In each of these situations, the law impermissibly discriminates; its barrier to equal treatment is imposed by the State.

Nor is a constitutionally invalid law saved by the fact that the barrier, once imposed, can in some cases be overcome. Thus, for example, the absence of an absolute bar-

rier precluding *all* widowers from receiving death benefits for their wives' work-related accidents, did not cure the constitutional infirmity in Missouri's worker's compensation law. *Wengler* v. *Druggists Mutual Insurance Co.*, 100 S. Ct. 1540 (1980). In *Wengler*, a widower who could prove actual dependency on his deceased wife's wages, or establish his mental or physical incapacity, was entitled to the same benefits as a widow, whose dependency was presumed. *Id.* at 1541. The lack of an absolute bar denying benefits to *all widowers* did not diminish the gender bias inherent in the Missouri law. *See also Califano* v. *Goldfarb*, 430 U.S. 199 (1977); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973). *Cf. Carey* v. *Population Services International*, 431 U.S. 678 (1977) (constitutional rights of prospective purchasers of contraceptives violated by regulation limiting—but not absolutely barring—access to contraceptives).

Moreover, a constitutionally invalid law is not cured because those who are disadvantaged by the discriminatory classification are able to voluntarily withdraw from disfavored status. Thus, a law allowing resident aliens to remove themselves from disfavored status by affirming an intent to apply for citizenship did not survive this Court's scrutiny in *Nyguist* v. *Mauclet*, 432 U.S. 1 (1977). As the Court stated clearly in *Nyquist*, "[t]he fact that the statute is not an absolute bar does not mean that it does not discriminate against the class." *Id.* at 9.

Here too, the Louisiana head and master law cannot be saved from constitutional infirmity by the fact that in some respects its gender classification does not erect an absolute bar. The Louisiana Supreme Court's holding to the contrary in *Corpus Christi Parish Credit Union* v. *Martin*, 358 So.2d 295 (La.), *cert. denied*, 439 U.S. 897 (1978), was wrongly decided and should not be followed. *Id.* at 299 (Tate, Calogero, Dennis, JJ., dissenting). The Louisiana male management statutory scheme inescapably discriminates against women.

C. The Louisiana Husband Management Scheme Is Freighted With The Baggage Of Sexual Stereotypes Incompatible With The Equal Protection Principle.

The determination by Louisiana to allocate the management of marital property to husbands, while precluding wives from such activity, is based on archaic and overbroad sexual stereotypes about the capabilities of men and women and the roles they are to play in society. *See* Vaughn, *Policy of Community Property, supra,* at 35-36. The husband, the stereotype dictates, is the competent marital partner, more practiced, experienced, and biologically capable of making judgments about business matters. *Id.* at 45. The wife, in contrast, is presumed inadequate and untrustworthy to function in economic spheres. She is deemed to be dependent upon the managerial skills of "the husband as the head of the family [and] . . . due to economic and biological factors . . . the member of the marital partnership more practiced and experienced in the acquisition and management of property." W.Q. de Funiak & M. Vaughn, *Principles of Community Property* 276 (2d ed. 1971) [hereinafter cited as de Funiak & Vaughn, *Principles of Community Property*].

The Louisiana scheme fosters and perpetuates the image of women as untutored and incapable of executing managerial decisions. The message of the Louisiana Legislature is inescapable: women inherently lack the ability to make reasonable decisions or function adequately in a business world; only men possess the requisite skills. Denigrating women, the Louisiana law decrees that the wife's contribution—as wage-earner or homemaker—belongs to the community, but that control over the administration or disposition of the property of that community belongs to the husband. Regardless of her demonstrated abilities as a manager in the home or in the business community, the wife is simply branded unworthy. Such a statutory scheme reflects an "attitude of 'romantic pater-

nalism' which, in practical effect, put women, not on a pedestal, but in a cage." *Frontiero* v. *Richardson,* 411 U.S. at 684. The economic consequences for wives without protection from their husband's presumed managerial skills can be severe. *See, e.g., United States* v. *Mitchell,* 403 U.S. 190 (1971); *Bagur* v. *Commissioner of Internal Revenue,* 603 F.2d 491 (5th Cir. 1979); *Corpus Christi Parish Credit Union* v. *Martin,* 358 So.2d at 296.

The presumption that the female is "destined solely for the home and the rearing of the family, and only the male for the marketplace and world of ideas" cannot justify Louisiana's gender classification. *Stanton* v. *Stanton,* 421 U.S. 7, 14-15 (1975). *See Orr* v. *Orr,* 440 U.S. 268, 283 (1979); *Craig* v. *Boren,* 429 U.S. at 202, n. 14. Nor can a legislative distinction be sustained by the assumption that "all or most male spouses are better administrators or possess non-substantiated particular attributes . . . [or] that all or most female spouses are housewives less fitted by occupation or interests than males to perform general economic functions." *Corpus Christi Parish Credit Union* v. *Martin,* 358 So.2d at 302; *see Reed* v. *Reed,* 404 U.S. at 76. The Louisiana head and master law impermissibly pigeonholes women and men solely on the basis of their sex and reinforces "the role-typing society has long imposed." *Stanton* v. *Stanton,* 421 U.S. at 15.

Legislative classifications rooted in such archaic and overbroad generalizations about the dependency of wives on their husbands, *Weinberger* v. *Wiesenfeld,* 420 U.S. 636, 643 (1975), or the allocation of family responsibilities, *Orr* v. *Orr,* 440 U.S. at 279, are incompatible with the equal protection principle. This Court has rejected such sexual stereotypes as the basis for gender classifications even where statistical support could be found to validate the stereotype for some. *See Craig* v. *Boren,* 429 U.S. at 200-04; *Weinberger* v. *Wiesenfeld,* 420 U.S. at 643; *Frontiero* v. *Richardson,* 411 U.S. at 681-82.

Here, the assumptions underlying the Louisiana head and master law are not related to economic or social realities, however different these realities may have been when male management was first enacted.[11] In over half of all marriages today the husband is not the sole breadwinner, responsible alone for generating marital property.[12] U.S. Dep't of Labor, *New Data Relate Workers' Earnings to the Families in Which They Live,* BLS News (March 27, 1980). Moreover, even where the wife is not in the paid labor force, her contribution to the marital community has gained increasing recognition. *See, e.g., DiFlorido* v. *DiFlorido,* 331 A.2d 174, 179, n. 15 (Pa. 1975); *Parsons* v. *Parsons,* 229 N.W.2d 629, 634-35 (Wis. 1975); D. Freed & H. Foster, *Divorce in the Fifty States: An Overview as of August 1, 1979,* 5 Fam. L. Rep. (BNA) 4027, 4031 (September 11, 1979); J. Krauskopf, *A Theory for "Just" Division of Marital Property in Missouri,* 41 Mo. L. Rev. 165, 168 (1976) [hereinafter cited as Krauskopf, *A Theory for "Just" Division*].

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[11] The notion of the husband as "head and master" of the marital community had its roots in the Middle Ages. *See Creech* v. *Capitol Mack, Inc.,* 287 So.2d 497 (La. 1973). It became part of the Louisiana Civil Code in 1825. K. Spaht, *Background of Marital Regimes Revision,* 39 La. L. Rev. 323 (1978-1979) [hereinafter cited as Spaht, *Background of Marital Regimes*]. One commentator suggests that husband management was perhaps in recognition of the fact that most husbands alone contributed monetary assets to the community fund. H. Daggett, *Is Joint Control of Community Property Possible?* 10 Tul. L. Rev. 589, 596-97 (1936). With only 5.6% of all wives gainfully employed in 1900, H. Hayghe, *Families and The Rise of Working Wives—An Overview,* 99 Monthly Labor Rev. 12 (May 1976), this may have at one time more closely reflected the labor force reality. *Amici* submit, however, that it never comported with economic reality because it never reflected the significant value that wives who are homemakers contribute to the marital partnership.

[12] In 1977, wage-earning wives contributed approximately 25% of their families' income; approximately 12% contributed 50% or more. H. Hayghe, *Working Wives' Contribution to Family Income in 1977,* 102 Monthly Labor Rev. 64 (October 1979).

Indeed, in Louisiana and seven other community property states, the joint ownership of community property is premised on the principle that each spouse contributes equally to the marriage, and therefore, that each should benefit from the material fruits of the union.[13] *Hisquierdo* v. *Hisquierdo,* 439 U.S. 572, 592 (1979) (Stewart, J., dissenting); R. Bartke, *Marital Sharing—Why Not Do It By Contract?* 67 Geo. L. J. 1131, 1134-35 (1979). Husband and wife, the system teaches, are equal partners. *Hisquierdo* v. *Hisquierdo,* 439 U.S. at 592; de Funiak & Vaughn, *Principles of Community Property, supra,* at 5; W. Reppy & W.O. de Funiak, *Community Property in the United States* 13 (1975). The spouses are deemed to have contributed equally to the acquisition of the property, regardless of the actual division of labor in the marriage and regardless of whether one spouse formally "earned" it. M. Planiol, *Treatise on Civil Law,* vol. 3, Part I, No. 934 (11th ed. 1938). "The underlying and undergirding drive of community is that each spouse is equal to the other. . . . Any provision denying equality is anti-community." Vaughn, *Policy of Community Property, supra,* at 34.

Thus, even if it is justifiable to mandate management by the marital partner who is more capable or has contributed more to the marital property, the inflexible as-

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[13] Although "the traditional view in common law states, is that ownership depends on title," *Hisquierdo* v. *Hisquierdo,* 439 U.S. at 578, common law states also are increasingly incorporating elements of marital partnership principles in their marriage and divorce laws. *Id.* at 578, n. 11; *See, e.g.,* Mich. Comp. Laws Ann. § 557.71 (West Supp. 1980) and Mass. Gen. Laws Ann. ch. 209, § 1 (West Supp. 1980) (as amended by St.1971, c. 423, § 14, St. 1979, c. 727) (eliminating common law presumption that husbands control property held by marital partners as tenants by the entireties); Conn. Gen. Stat. Ann. § 46b-81 (West 1979) (providing for equitable distribution of property, however titled, at time of divorce); Wis. Stat. Ann. § 767-255 (West Supp. 1980) (presumption that non-inherited property, however titled, be divided equally upon divorce); Krauskopf, *A Theory for "Just" Division, supra,* at 167-73.

sumption that this person is the husband does not comport with reality. As the Louisiana Legislature recognized in replacing "head and master" with equal management by husband and wife,[14] sex is not an accurate proxy for managerial competence, contribution or ownership. *Cf. Craig* v. *Boren,* 429 U.S. at 198. The Legislature stated clearly that implementation of equal management is called for because "wives in Louisiana are capable today of managing property," and "the present equality of ownership during marriage . . . should be matched with equality of access to use of community property during marriage." La. S. Con. Res. 54, Reg. Sess. (1977).

The Louisiana head and master law challenged herein perpetuates a view of women as second class citizens dependent upon the managerial skills of their husbands and "carries with it the baggage of sexual stereotypes." *Orr* v. *Orr,* 440 U.S. at 283. As this Court has recognized consistently in its decisions over the past decade, such gender based role typing is constitutionally impermissible.

II.

LOUISIANA'S GENDER BASED HEAD AND MASTER LAW LACKS THE REQUISITE SUBSTANTIAL RELATIONSHIP TO AN IMPORTANT GOVERNMENTAL OBJECTIVE.

A. The Standard For Review Of Gender Based Classifications Was Articulated In *Craig* v. *Boren.*

This Court has explicitly recognized that gender based classifications, "not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination." *Personnel Administrator of Massachusetts* v. *Feeney,* 442 U.S. 256, 273 (1979). For this

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[14] With the repeal of male management, effective January 1, 1980, Louisiana joined the seven other community property states in making management and control of the marital property gender neutral. *See infra* at 28.

reason, gender classifications must "serve important governmental objectives and must be substantially related to achievement of those objectives" in order to be deemed constitutional. *Craig* v. *Boren,* 429 U.S. at 197. Governmental objectives found to be merely legitimate rather than important do not satisfy this standard. *Reed* v. *Reed,* 404 U.S. at 76.

This careful scrutiny has been applied consistently by this Court to every fourteenth amendment sex discrimination claim it has considered since *Craig. See, e.g., Wengler* v. *Druggists Mutual Insurance Co.,* 100 S. Ct. at 1545; *Orr* v. *Orr,* 440 U.S. at 279; *Califano* v. *Westcott,* 443 U.S. 76, 89 (1978), *aff'd,* 443 U.S. 901 (1979); *Califano* v. *Goldfarb,* 430 U.S. at 210-11. The standard is rigorous. Since 1971, the opinions of this Court have upheld only those few gender classifications found to compensate women for past discrimination. *Califano* v. *Webster,* 430 U.S. 313 (1977); *Schlesinger* v. *Ballard,* 419 U.S. 498 (1975); *Kahn* v. *Shevin,* 416 U.S. 351 (1974). No such claim has been or could be made for the statute at issue here.

The practical effect of the *Craig* test, correctly applied by the Fifth Circuit below, is to make gender classifications *prima facie* unconstitutional: "[t]he burden . . . is on those defending the discrimination to make out the claimed justification . . ." *Wengler* v. *Druggists Mutual Insurance Co.,* 100 S. Ct. at 1546. The proponents of the head and master statute have totally failed to carry this burden. No important state interest has been articulated either by Appellant or by the State of Louisiana. At the same time, no showing whatsoever has been made that there is the requisite substantial relationship between the state's interest and the invidious gender classification employed in the statute which gives husbands unilateral and unrestricted managerial power over the community property.

B. The Governmental Objective To Be Achieved By Article 2404 Has Not Been Articulated By The State.

In the proceedings below Louisiana supported its legislative scheme with one justification, which the Fifth Circuit found completely inadequate:

> The State . . . has given us only *one sentence* on the state objective to be achieved in article 2404: One of the two spouses has to be designated as the manager of the community."

Kirchberg v. *Feenstra,* 609 F.2d at 735 (emphasis in original).

No further elaboration by the State is to be found either in this record or in the legislative history of the provision.[15] Appellant Kirchberg's brief offers no further guidance on this issue. This Court has cautioned that it will consider only those actually articulated state interests which are "legitimate and non-illusory," and will not speculate as to governmental objectives. *McGinnis* v. *Royster,* 410 U.S. 263, 276-77 (1973); *see also, Schlesinger* v. *Ballard,* 419 U.S. at 520. It can only be concluded that Louisiana has come forward with no important governmental objective because, in fact, none exists.

The Fifth Circuit speculated that the State's single sentence may have constituted its assertion of a governmental interest in providing for the way in which marital property is to be managed. *Kirchberg* v. *Feenstra,* 609 F.2d at 735. The very fact, however, that the court had to indulge in such reasoning conclusively demonstrates that

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[15] The State not only failed to articulate the objective served by the gender classification in the proceedings below, but also has sought dismissal of this appeal from the Fifth Circuit's decision that the head and master law is unconstitutional. Certainly if the state could have overcome the Fifth Circuit's objections to its statutory scheme raised by the court below, or believed there was any value in defending the male management regime, it would have done so.

the State has failed to carry its burden of articulating the governmental interest advanced by the challenged gender based classification.[16]

Moreover, the similarity of the statutory scheme at issue here to the one challenged in *Reed* v. *Reed* suggests that Louisiana would not be able to identify a sufficiently important governmental interest to be served by its gender classification. In *Reed,* the State of Idaho, unlike Louisiana here, articulated two governmental objectives to be served by its gender based preference for similarly situated males as estate administrators. This Court found one objective, the avoidance of intrafamily controversy, to be irrelevant and the other, reduction of the probate court's workload, to amount to nothing more than a desire for administrative efficiency. *Reed* v. *Reed,* 410 U.S. at 75. In *Reed,* as here, the challenged statute regulated the administration of property, after probate and during marriage, respectively. Louisiana's statement in this suit that "[o]ne . . . has to be designated manager" suggests a state interest no more important than, and not different from, the claim of administrative efficiency already found insufficient in *Reed.*

C. The Gender Based Classification In Article 2404 Is Not Substantially Related To An Important Governmental Interest.

The application of the second prong of the *Craig* test reveals most sharply why Louisiana's head and master

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[16] Speculation can also provide a number of other possibly relevant government interests, all of which have been previously rejected by this Court as not sufficiently important to justify the use of a gender based classification. *See, e.g., Orr* v. *Orr,* 440 U.S. at 269 (state's preference for an allocation of family responsibilities under which the wife plays a dependent role not sufficiently important to justify sex based statute); *Frontiero* v. *Richardson,* 411 U.S. at 690 (administrative convenience not an important state interest); *Reed* v. *Reed,* 404 U.S. at 76-77 (goals of avoidance of intrafamily controversy and reducing court workload not important enough to sustain gender classification).

law must fall. Even if we assume that the designation of a single manager for the community property is an important governmental interest, Louisiana has utterly failed to demonstrate why that manager must unquestioningly and inevitably be the husband.

The "substantial relationship" analysis applicable here encompasses two related inquiries: whether the gender classification is "carefully tailored" so that it advances the important governmental interest without carrying with it the "baggage of sexual stereotypes," *Orr* v. *Orr,* 440 U.S. at 283, and whether the classification employed is the least discriminatory method available to the State to achieve its objective. *Craig* v. *Boren,* 429 U.S. at 211. Because of the severe and pervasive nature of sex discrimination, this Court has stated that a gender classification should not be upheld without "an exceedingly persuasive justification." *Personnel Administrator of Massachusetts* v. *Feeney,* 442 U.S. at 273.

The classification employed in Article 2404 does not promote any important governmental objective. The use of sex as a proxy for managerial competence or contribution to the assets of the community makes the classification simultaneously overbroad, because it gives all husbands power of management whether or not they are actually competent to manage or have contributed to the community, and underinclusive, because it excludes all women from management regardless of their competency or contribution. *Cf. Craig* v. *Boren,* 429 U.S. at 199. As discussed in Point I, above, this gender classification, which remained unchanged for more than a century and a half, is squarely based on stereotypical notions about the respective roles and abilities of women and men. Such outdated ideas cannot supply an adequate justification for a gender based statute. *Stanton* v. *Stanton,* 421 U.S. at 14.

At the same time, it is clear that Article 2404 does not represent the least discriminatory method of furthering

the governmental objective. Here again, Louisiana has failed to come forward with the showing required to support its legislative choice. As the Fifth Circuit recognized, the State would be hard pressed to do so in light of its recent repeal of Article 2404. *Kirchberg* v. *Feenstra*, 609 F.2d at 735. Louisiana's enactment of an equal management statute and its concomitant recognition both that women are competent to manage and that persons who have equal ownership rights are entitled to equal management powers,[17] eliminates any pretense that the statute is closely related to an important governmental interest. Having adopted a gender neutral provision, it is awkward if not impossible for the State to argue that male management better achieved the state objective.[18]

The legislative reform effected by Louisiana was consistent with actions already taken by the seven other community property states. All of these states have abandoned male management for some form of equal management[19], showing that there is a consensus for the idea that sex based classification is neither the least discriminatory nor the most efficient or accurate method of allocating managerial power in the community. Similarly, common law property jurisdictions have largely eradicated

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[17] *See* S. Con. Res. 54, Reg. Sess. 1977, discussed *supra* at 23.

[18] While there is of course a difference between what a state does voluntarily and what it is constitutionally compelled to do, it appears that in this situation the two coincided. Louisiana's revision of Article 2404 was prompted in large measure by this Court's decision in *Reed*. Spaht, *Background of Marital Regimes*, *supra*, at 324.

[19] Ariz. Rev. Stat. Ann. § 25-214 (West 1976); Cal. Civ. Code § 5125 (West Supp. 1979-1980); Idaho Code § 32-912 (Supp. 1977); Nev. Rev. Stat. § 123.230 (1967); N.M. Stat. Ann 40-3-14 (Michie 1978); Tex. Fam. Code Ann. tit. 1, § 5.22 (Vernon 1975); Wash Rev. Code Ann. § 26.16.030 (West Supp. 1979-1980).

by statute the vestiges of male management from their marital property laws in favor of equitable management.[20]

Thus, the gender classification in Article 2404 does not satisfy either component of the "substantial relationship" inquiry: it is not carefully tailored to avoid sexual stereotypes and it does not represent the least discriminatory means for achieving any important governmental objective. The inescapable conclusion is that Louisiana's head and master law violates the equal protection clause.

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[20] In common law property jurisdictions, each spouse generally controls the property held in his or her name. However, property held by husband and wife as tenants by the entirety, while supposedly owned by the marital unit as a single entity, was not subject to equal control by the married couple. At common law, entireties property was under the exclusive control of the husband. He had the sole privilege of occupancy and was entitled to all of the income from the property. He could alienate these property rights without his wife's consent and his creditors could levy against them. J. Johnston, *Sex and Property*, 47 N.Y.U. L. Rev. 1033, 1085 (1972).

After the passage of the Married Women's Property Acts in the latter part of the nineteenth century, guaranteeing to women the management and control of their separate property, a majority of jurisdictions abolished male management of entireties property. *Id.* at 1085-86. The courts in Michigan, Massachusetts and North Carolina, however, construed their states' acts as having no impact on these tenancies. O. Phipps, *Tenancy by Entireties*, 25 Temp. L. Q. 24, 32 (1951-1952). In 1975 and 1979 respectively, Michigan and Massachusetts enacted statutes which provide for equal management of all property held as tenants by the entireties. Mich. Comp. Law Ann. § 557.51 (West Supp. 1980); Mass. Gen. Laws Ann. ch. 209 § 1 (West Supp. 1980) (as amended by St.1979, c. 727 (1979)). Today, North Carolina is the only state to still use this sex based scheme of control. *See Rauchfuss v. Rauchfuss*, 33 N.C. App. 108 (Ct.App. 1977).

Conclusion

For the reasons set forth above, *amici* respectfully submit that the decision of the Fifth Circuit declaring Article 2404 unconstitutional should be affirmed.

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